

Lecky's Circle:

Thoughts from the Frontier of International Law

Address

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As every Londoner knows, Samuel Johnson once said that, "When a man is tired of London, he is tired of life."¹ I never tire of London, because London is so full of life. No doubt my wife, Rebecca, would add that it is true also that I never tire of London because London is also full of books. When in London, I spend much of my time looking at old books on the dusty shelves of London's bookshops. Sometimes, Rebecca even lets me buy one.

In truth, I must confess that I spend much of my life looking at old books on dusty shelves in bookshops all over the world. One of my favorites is "The Bookworm," a small bookshop on the *Rue Sismondi* in Geneva that specializes in used English books. I can often be found in "The Bookworm" on those weekends in Geneva when I am not too busy reading the fine print of voluminous WTO panel reports.

It was there where I first met a Londoner named William Edward Hartpole Lecky.

It happened some time ago on a rainy Sunday afternoon in "The Bookworm." On several previous visits, my eye had been caught by the intriguing title of an old book on the top shelf in the musty section of the bookshop devoted to old tomes on "philosophy." The title on the faded cover of the book was History of European Morals from Augustus to Charlemagne.² The author was someone named W.E.H. Lecky. Typical benighted American that I am, I had, at the time, never heard, or read a word, of W.E.H. Lecky.

On my previous visits, my interest in the history of European morals had not proven to be sufficient to overcome the fact that the top shelf in "The Bookworm" is too high for someone of my short stature to reach. But, at last, on this particular rainy Sunday afternoon, my curiosity got the best of me, and I reached up as high as I could, pulled down the old book, and purchased it for the sum of twenty-five Swiss francs.

It was money well spent. I began reading the book that Sunday evening, read it through most of that night, and finished reading it the next day. Lecky's book on the history of European morals during European antiquity was one I needed to read. In my view, it is one we all need to read. For, in my view, William Edward Hartpole Lecky was a man who knew the way forward to a morality that can embrace and serve all humanity.

There was a time when W.E.H. Lecky was renowned throughout much of the world. He was once widely seen as a man who had much to say that was worth saying, and worth remembering, about morality and about humanity. When he died, a statue of him was placed outside the University of Dublin in Ireland. Today, that statue still stands there, but, today, the man himself is not much remembered. The lofty reputation that Lecky enjoyed a century ago has for some reason diminished with the passing of the years. Most of his many books are long out of print. They sit unread on dusty shelves in the quiet libraries and in the antiquarian bookshops of the world.

This is unfortunate, for Lecky was a writer and a thinker who was in many ways far ahead of his time. Indeed, he was a writer and a thinker who was in many ways far ahead of *our* time.

Born in Dublin in 1838, W.E.H. Lecky was a man of many parts. He was an historian. He was an essayist. He was, for a time, a Member of Parliament. He was a wealthy, landed Anglo-Irish aristocrat whose life spanned the Victorian era, and reflected much about that era. He was — in the great tradition of Gibbon, Macaulay, Carlyle, Grote, Burke, and others — one of the last of the classic eighteenth and nineteenth century “men of letters” who wrote about history in an elegant and philosophical style that enriched the English language. He has been described by his biographer, Donal McCartney, as “one of the last of the great line of amateur literary historians writing in English,” and as “one of the last of the historiographical school of the Enlightenment.”³

After completing his studies at Trinity College in Dublin, Lecky spent several years in additional self-schooling while touring Europe in search of Enlightenment. He traveled widely, reading extensively and intensively in all the great continental libraries, and living what he described as a “half vagabond, half bookworm existence, diving into half the libraries of Europe and breaking unhappy porters’ backs with the boxes of books.”⁴ More than once, his studious travels took him through Geneva. Had “The Bookworm” been there at the time, no doubt Lecky would have found it.

Eventually, Lecky and his boxes of books settled in London. Like many others before and since, he wanted to be near the Reading Room of the British Museum. (His books are on display there today, behind protective panes of glass.) He filled the library in his townhouse in South Kensington with an ever-growing collection of books. He then devoted the rest of his life and his leisure to writing lengthy and thoughtful books in which he tried to solve the persistent puzzle of human progress.

One of those books is the one that I pulled from the top shelf in “The Bookworm.” Written while Lecky was still in his twenties, and first published in 1869 when he was only thirty-one, it is an account in more than eight hundred pages of the progressive unfolding in antiquity of the notion that there is such a thing as “humanity.” Lecky’s message in the book resonated in a mid-Victorian world that believed in the progress of humanity. The book went through fifteen editions in Great Britain. It was even more popular at the time in the United States. Dusty though the book may be, its message resonates even today. For, even today, we are far from understanding, and even farther from implementing, Lecky’s moral message for all humanity.

Lecky’s message was about a *circle*.

Here is some of what he had to say:

“In the first dawning of the human intelligence ... the notion of *duty*, as distinguished from that of *interest*, appears, and the mind, in reviewing the various emotions by which it is influenced, recognises the unselfish and benevolent motives as

essentially and generically superior to the selfish and the cruel. But it is the general condition of society alone that determines the standard of benevolence — the classes toward which every good man will exercise it. At first, *the range of duty* is the family, the tribe, the state, the confederation. Within these limits every man feels himself under moral obligations to those about him; but he regards the outer world as we regard wild animals, as beings upon whom he may *justifiably prey*.”⁵

Elsewhere in the same book, Lecky elaborated on this provocative thought:

“Men come into the world with their benevolent affections very inferior in power to their selfish ones, and the function of morals is to invert this order. The extinction of all selfish feeling is impossible for an individual, and if it were general, it would result in the dissolution of society. The question of morals must always be a question of proportion or of degree. At one time the benevolent affections embrace merely the family, soon *the circle expanding* includes first a class, then a nation, then a coalition of nations, then *all humanity*, and finally, its influence is felt in the dealings of man with the animal world....”⁶

Lecky described this expanding circle of human morality as “*the enlarging circle of sympathy*.”⁷ This circle of sympathy that he saw unfolding progressively in human history, and that he foresaw as eventually including all of humanity, might be described as *Lecky’s circle*.

W.E.H. Lecky was an old-fashioned moral philosopher. His idea was that ever-higher, ever-broader moral standards of the duties we owe to one another as human beings evolve as signs of an ever-unfolding, ever-advancing progress in human history. His idea was that history records and reflects an ever-evolving, ever-progressing, ever-expanding human morality. His was a simple idea, and the way he chose to express his idea was with the simplicity of the circle. We live our lives in circles, and the size of our circles shapes the dimensions of our lives. The larger our circle, the larger our lives, for the larger our circle, the larger our scope of concern for others, and the larger our claim to the morality of a *true humanity*.

I have a front row seat on the frontier of international law. For this reason, I was asked to speak in London about my view of the many far-flung frontiers of international law. The contemplation of those frontiers causes me to linger with Lecky’s thoughts about circles. I do so because, as I see it, the true frontiers of international law are not the frontiers of law at all. They are the frontiers of the human morality that precedes law. They are the frontiers of our range of duty to the rest of humanity. In my judgment, in my experience, in my view from the circle where I live on the frontier of international law, the boundaries of the circle of our human sympathy are the true frontiers. For they are the frontiers that ultimately define also the boundaries of what we truly recognize and respect as law, and, therefore, of what we truly are willing to uphold and enforce as law.

Lecky has long since left us. He died one hundred years ago, in 1903, while, fittingly enough, reading one of the books in his London library. Lecky is gone. But, a

century later, the frontiers of international law are expanding in ways that he foresaw. They are expanding because the circle of human sympathy is expanding. The significance of international law is increasing in the world because of the ongoing enlargement in the world of what we see as our range of duty. Today, a century after Lecky's death, the boundaries of international law are at last approaching the visionary boundaries of Lecky's circle.

This can be seen in many of the frontiers of international law. However, perhaps most clearly, perhaps most visibly, and perhaps most significantly, this can be seen in the frontier of international law where I live and where I have spent the past eight years. It can be seen where I spend much of my time when I am not browsing in old bookshops. It can be seen in the frontier of international law called the "WTO."

The "WTO" is, of course, the World Trade Organization. There may be no more important, no more innovative, and no more controversial international institution in all the world than the World Trade Organization. The WTO is less than a decade old, but the WTO has been busy from its very beginning expanding the range of human duty, extending the frontiers of international law, and thereby contributing to the enlargement of the human circle.

There are many examples of how busy we are at the WTO. One is the rising pile of WTO dispute settlement reports on my desk that prevents me from spending more of my time reading the thoughts of W.E.H. Lecky. But just how busy we are at the WTO is perhaps best illustrated by the ever-increasing numbers of people going online all around the world to learn more about the WTO. The number of people who visit "wto.org" monthly has now reached *twenty-two million*, and is rising rapidly. There are no dusty shelves on the WTO website.

If he is among the growing millions who are surfing the WTO website, if he is somewhere today in some wired celestial library sifting through the thousands of pages of reports of WTO proceedings that have been placed on the Worldwide Web, then surely Lecky is smiling at the success thus far of the WTO. The WTO is a conscious and considered international effort to use trade as a means of approaching Lecky's circle. By expanding trade, the WTO is also expanding the opportunities for enlarging the range of human sympathy to include the full extent of Lecky's circle.

There are several circles within the WTO that serve an enlarged circle of human sympathy. I would like to think that Lecky is smiling most of all at the accomplishments of the small but busy circle where I live and work within the WTO called the "Appellate Body." The Appellate Body is the circle of seven international jurists who help the nations that are the Members of the WTO make binding judgments in final appeals in their international trade disputes.

Our small circle helps the Members of the WTO resolve international disputes involving the whole vast and varied array of goods and services that are traded in the world every day — including everything from apples to bananas, from airplanes to

poultry, and from shrimp to semiconductors to supercomputers to steel. These international disputes affect billions of people by affecting billions of dollars in world trade. These international disputes result in rulings in international law that affect almost all of world trade.

Ours is a circle of seven that sits at a round table in a small room in the far corner of the far wing of the Italianate villa on the lake of Geneva that serves as the international headquarters of the WTO. As we sit together in our small room, as we work together day by day, our circle seems small to us. But our circle in our small room is large enough to affect almost all the world. Our “range of duty” to the Members of the WTO, and, through them, to humanity, includes much of what happens every day in the world economy.

Ours is a circle that is new to the world. Like the WTO itself, the Appellate Body is less than a decade old. The Appellate Body was created along with the WTO as a “quasi-judicial” institution within the WTO in 1995. The WTO is the successor to an earlier international institution, the General Agreement on Tariffs and Trade — the “GATT.” In a sense that Lecky would surely understand, we are heirs on the Appellate Body to the nearly fifty years of ever-evolving, ever-progressing experience of the GATT in resolving international trade disputes following the end of the Second World War. Like human morality, human political economy, from the GATT to the WTO, is ever-unfolding.

Ours is also a circle that has been drawn by the world. The seven of us who sit around our table were each nominated by our individual countries, but we were each appointed by all of the 146 countries and other customs territories that are Members of the WTO. Thus, we each serve all 146 Members of the WTO. The Members of the WTO account for more than 95 percent of all world trade by more than five billion people. Every country of the world is either a Member of the WTO or seems to want to be. The ever-enlarging circle of WTO membership is expanding rapidly. In time, it will include all the world.

Ours, furthermore, is a circle that has been drawn in the *mutual interest* of the world. The Members of the WTO have invented the WTO-based world trading system as a way of coming together and working together to lower the barriers to trade and, thus, to raise the levels of their mutual prosperity. They have invented the WTO dispute settlement system as a way of upholding the trading rules on which they have all agreed. They have invented the small circle of the Appellate Body as a way of helping them clarify their obligations under those rules so they can uphold them within the ever-enlarging circle of the world trading system.

Moreover, ours is a circle of mutual interest that also has been, from the very beginning, a circle of *mutual trust*. The table of the Appellate Body is round because we seven sit at our table as equals. No one sits at the “head” of our table. Thus, our table is like Thomas Jefferson’s table in Monticello long ago. Jefferson believed that those who

sit together around a round table sit together as equals, and so do we. We are equal at our table, and we are equal in our trust of one another.

Our mutual trust is the result of our years of hard work while sitting together around our table. The seven of us on the Appellate Body are very different people. We come from seven different backgrounds, seven different cultures, seven different ways of seeing the world. Importantly for our work together around our table, we also come from seven different systems of jurisprudence. But we share one guiding philosophical approach that shapes our perspective and, therefore, shapes as well the results of our work. If Lecky sat with us at our table, undoubtedly he would also share this one guiding approach.

Our work is legal work. Our task is to help the Members of the WTO resolve the legal issues that are raised on appeal in WTO dispute settlement. These legal issues are legal questions about the nature of the obligations of the WTO Members in the many “covered agreements” of the WTO treaty. Our challenge is thus a legal challenge of working together to reach a consensus on the right legal answers to those legal questions. In this way, we help the Members of the WTO clarify those obligations and thus help them resolve difficult international trade disputes.

We have been able to find the right answers through the years at our table in large part because our shared approach to finding the right answers is founded on our firm mutual belief in both the necessity and the value of the *conversations* that comprise our deliberations. Our deliberations are conversations in the best and truest sense of the word. They are open. They are lively. They are engaging. They are, above all, demanding exercises in *mutual criticism*. They are extended exercises in advocating, in debating, in communicating, and — most of all — in listening. They are shared efforts in mutual thinking that lead to mutual agreement. They are enlightening conversations that have led the seven of us to our enduring *mutual trust*.

The seven of us on the Appellate Body may be very different in very many ways. We are very much alike, though, in our mutual confidence in real and reasoned conversation as the right approach to reaching the right answers and to creating mutual trust. This shared confidence has made all the difference to us through the years in building a new institution for the benefit of a world that is much in need of mutual trust.

On the Appellate Body, we believe that a willingness to engage in reasoned and reasonable deliberation through the principled practice of mutual criticism is one of the keys to creating and sustaining human freedom. We also believe that one of the best ways to enlarge the circle of human sympathy is by enlarging the circle of our thinking through the considerable power of mutual, rational thought. We believe that, by listening to one another, we can learn from one another, and we can learn also to trust one another. We believe, too, that trust sought and secured in this way can serve the cause of human freedom.

This is our shared view. This was, of course, also the view of that other Londoner, Lecky's fellow traveler on the long road to human morality, John Stuart Mill. Perhaps the best statement of Mill's view is in his classic essay On Liberty.⁸ No doubt his essay On Liberty had a place of honor in Lecky's library, as it does in the personal libraries of everyone who has ever served on the Appellate Body. Everyone who has sat at the round table of the Appellate Body would agree that Mill's famous essay expresses abiding truths about how best to serve the cause of human freedom. Indeed, my dear friend and former colleague on the Appellate Body, the late Chris Beeby, of New Zealand, was able to quote long passages of On Liberty from memory.

We may have seven different perspectives on the Appellate Body. We may have seven different points of view on any given legal issue. However, we share with Mill a fundamental belief in reason and in reasonableness. We share with Mill the view that the best way to reach a consensus is the "salutary effect" of a "collision of opinions."⁹ We agree with him that "truth has no chance but in proportion as every side of it, every opinion which embodies any fraction of the truth, not only finds advocates, but is listened to."¹⁰ This, as we see it, is the key to securing and serving freedom. And this, as I see it, is the key also to our continuing mutual trust, and to our continuing consensus on the Appellate Body.

The small circle of the Appellate Body serves the large circle of humanity that is represented by the Members of the WTO. Our "range of duty" is to the entire population of all of the 146 Members of the WTO. Five billion people are with us whenever we sit together at our table. They are all part of our circle of human sympathy. Their needs, their longing, their passions, their aspirations for a fuller and truer humanity — their fondest hopes for freedom — are all ever with us as we reason together in our efforts to help the Members of the WTO clarify and uphold their international treaty obligations. We believe that, by reasoning together, we can best serve all their hopes for freedom.

Through our reliance on reasonableness, the mutual criticism around our table creates mutual trust, and the conversation around our table creates consensus. The strength of our consensus is reflected in the results of our work thus far. Since the Appellate Body was established in 1995, there have been nearly sixty appeals in WTO dispute settlement. In not one of those nearly sixty appeals has any Member of the Appellate Body ever dissented from the findings or the conclusions of any Appellate Body Report. Every single one of our decisions has been by consensus. We do not claim infallibility for the Appellate Body, but, to the extent that we seven have been fallible in our work for the Members of the WTO, even our most vocal critics must acknowledge that we have been fallible *together*.

To my mind, the consensus we have shared on the Appellate Body has contributed much to the success of our new institution in the short time we have sat together at our table. Claus-Dieter Ehlermann, who sat beside me at our table during my first six years on the Appellate Body, has said that our shared goal from the very start was the establishment of an independent, quasi-judicial institution that would serve all the Members of the WTO equally and effectively.¹¹ As usual, I agree with Claus. This has

been our mutual goal from the very first time we sat down together, and I would submit that, thus far, we have succeeded in our mutual efforts to achieve it.

There are other reasons as well for our initial success. Contributing also to the success of the Appellate Body in achieving our shared goal of serving the Members of the WTO equally and effectively has been our *uniqueness* as an international tribunal. The Appellate Body is unique in two ways: we have what we lawyers call “compulsory jurisdiction,” and we make decisions that are upheld. This is true of no other international tribunal in the world. Indeed, this has never been true of any other international tribunal in the *history* of the world.

We have compulsory jurisdiction because all of the Members of the WTO have agreed in the WTO treaty to use the WTO dispute settlement system to resolve all their treaty-related disputes with other WTO Members. We make decisions that are upheld because all of the Members of the WTO have agreed in the treaty that any Member that chooses — in an exercise of its sovereignty — *not* to comply with a decision in dispute settlement can be subject to economic sanctions by other Members. These potential sanctions can include the loss of some of the valuable trade concessions that have been made by other Members in the treaty.

Our uniqueness helps explain why there is no dust on the shelves of the WTO website. Because WTO Members must take their treaty-related trade disputes with other WTO Members to the WTO, and because the decisions made about those disputes in dispute settlement are upheld, WTO rules and rulings have real force as real international law for the international economy. This means that what happens in the WTO is vitally important to all those five billion people who are served by the WTO and who, as we see it, are always with us whenever we sit down together at our table.

Although our uniqueness is the source of much of our success, it is the source also of much of the controversy that surrounds our rulings. The protests. The press conferences. The speeches in the Congress. The college students in their colorful turtle costumes. None of it would have happened if the Appellate Body were just like every other international tribunal. It is easy to ignore an international tribunal when the authority behind its rulings exists only on paper. It is hard to ignore an international tribunal with compulsory jurisdiction whose decisions are upheld.

Institutionally, our small circle of seven serves a *larger circle* of the WTO. The reports and recommendations of the Appellate Body are adopted by consensus of another, larger circle within the WTO called the *Dispute Settlement Body*. The Dispute Settlement Body — the “DSB” — consists of all 146 WTO Members acting together in WTO dispute settlement. The WTO is truly a “Member-driven” institution, and the Members of the DSB are truly the ultimate decision-makers in WTO dispute settlement.

The DSB is merely the name the Members of the WTO use when they are dealing with dispute settlement. The very same countries and other customs territories that comprise the DSB also comprise the *largest circle* of the WTO, which is the deliberative

circle consisting of all of the Members of the WTO when they engage in negotiations on new rules for the world trading system. Even now, the Members of the WTO are engaged in a new global “round” of multilateral trade negotiations under the auspices of the WTO.

This new round of global trade negotiations is called the “Doha Development Round.” Begun in Doha, Qatar, in 2001, it is the ninth such round of multilateral trade negotiations since the Second World War, and the first since the creation of the WTO. The stakes have never been higher for the world. Goods. Services. Agriculture. Manufacturing. Additional market access of all kinds. The continued lowering of tariff and other trade barriers of all kinds. The negotiation of new rules for competition, investment, intellectual property, and many other areas of the international economy that affect, and are affected by, international trade. These are only a few of the issues on the agenda of the Doha Development Round. In particular, the overriding goal of the new round is to bring the *developing* countries of the world into the mainstream of the WTO-based world trading system so that they will be able to profit and prosper as they should through expanded opportunities for international trade.

In a truly “Lecky-like” way, the eight previous global rounds of multilateral trade negotiations have contributed to enlarging the global circle by expanding global economic growth significantly in the past half century. Since the creation of the GATT in the aftermath of the Bretton Woods conference at the conclusion of the Second World War, the GATT-based and, now, WTO-based, world trading system has gradually lowered barriers to trade throughout the world while it has also gradually grown to include almost all of the world. Due in large part to these multilateral efforts, global trade has increased *fourteen-fold* in the half century or so since the creation of the GATT. This increase in world trade has supported a *six-fold* increase in global GDP.¹² WTO figures show that worldwide exports that, in 1950, accounted for only eight percent of worldwide production, today account for more than 26 percent of worldwide production.¹³ As world trade continues to grow, this percentage continues to grow as well.

Overall, more economic progress has been made in the past half century than in the previous half millennium. Our progress in trade is the most significant economic progress the world has made in the past half century. And much of this progress has been made because of the world trading system that was established under the GATT and is served now by the WTO. Thanks in no small part to trade liberalization, millions upon millions of people in every part of the world have been lifted out of poverty. The dynamic growth of world trade has been the engine of the longest and strongest period of sustained economic growth in human history. Humanity has enjoyed unprecedented prosperity in the wake of what one of Lecky’s many intellectual heirs, President John F. Kennedy, an early and ardent champion of the multilateral trading system, described rightly — and memorably — as “the rising tide of trade.”¹⁴

The benefits for the United States and for other *developed* countries from the successful conclusion of the current round of multilateral trade negotiations could be

equally significant to this rising tide. The developed countries that are Members of the WTO stand to benefit enormously from continued multilateral trade liberalization. One recent study, at the University of Michigan, has concluded that if *all* the global barriers to trade in goods and services were eliminated, then the gain for the United States alone would be \$537 billion — almost 6 percent of the annual U.S. gross domestic product.¹⁵

The benefits for the *developing* countries that are Members of the WTO would, however, be even greater. The scheduled implementation of the remaining trade concessions made in the Uruguay Round is expected to facilitate economic growth that will lift an additional *600 million people* worldwide out of poverty. We could add impressively to these numbers with the successful conclusion of the current round.

The World Bank has estimated that the abolition of *all* trade barriers in the new round, coupled with needed market reforms, would add *\$2.8 billion dollars* to global income by 2015. Most of this additional global income — *1.5 trillion dollars* — would be in developing countries. This would lift an additional *320 million people* in developing countries out of poverty.¹⁶ The elimination of all tariff and non-tariff trade barriers could result in gains for developing countries of \$182 billion in services, \$162 billion in manufactures, and \$32 billion in agriculture.¹⁷

Not even Lecky would be optimistic enough to suggest that the Members of the WTO will abolish *all* the remaining barriers to world trade in this latest round of negotiations. Trade liberalization has always been an incremental process. Surely it will remain so. Still, these numbers show that abolishing even *some* of these remaining trade barriers could result in significant benefits for the developing countries that comprise an increasing majority of the membership of the WTO.

President George W. Bush has said, “We have the opportunity to include all the world’s poor in an expanding circle of development.”¹⁸ On this, I agree with the President of the United States. Perhaps he, too, has read what W.E.H. Lecky wrote all those years ago about circles. And, in my view, there is no better way to expand the circle of development, there is no better way to further the continued development of developing countries, than through further, mutual, and substantial trade liberalization by the Members of the WTO in the Doha Development Round.

Developing and developed countries alike can benefit enormously from the increased economic growth that will result from additional trade liberalization. Everyone everywhere can benefit from more market access in every part of the world. As it is, the global economy is stalled by all the uncertainties occasioned by a unique combination of disease, terror, and economic downturn. I know of no better or surer way to help jump-start the weakened battery of our sluggish global economy than by the negotiation of new rules to lower the remaining barriers to trade in an early, successful, and balanced conclusion to the Doha Development Round.

The benefits of a successful conclusion of the current round would come none too soon for all of us. This would be especially so, though, for developing countries. The

World Bank reports that there are 1.2 billion people in the world who live on less than \$1 per day, and that there are 2.8 billion people in the world who live on less than \$2 per day.¹⁹ “Of the 4.6 billion people in developing countries, more than 850 million are illiterate, nearly a billion lack access to improved water resources, and 2.4 billion lack access to basic sanitation. Nearly 325 million boys and girls are out of school. And 11 million children under age five die each year from preventable causes — equivalent to more than 30,000 a day.”²⁰ So says the World Bank. These, to say the least, are numbing statistics.²¹

We must not, however, be numbed by these statistics. Those of us who see the circle of human sympathy as including all of humanity must not turn our eyes away from these many global human concerns. Lecky was able to live a life of financial ease and lettered leisure because he was an absentee Irish landlord. By all accounts, he was an enlightened landlord. All the same, he was able to spend his time reading in his library and writing his books because he profited from the sweat of others. He never forgot this. Neither must we. To be sure, most of us profit from our own efforts. Yet, most of us also, like Lecky, profit from the sweat of others. And, like Lecky, we must not forget this. One of the best ways we can remember others, one of the best ways we can help others, is through further trade liberalization in a successful conclusion of the Doha Development Round. Significantly, this is also one of the best ways we can help ourselves — because this also happens to be very much in our own self-interest.

Moreover, serious negotiations on a successful conclusion of the current round of multilateral trade negotiations are all the more imperative as a way of reassuring the world at this critical time that the nations of the world do remain capable of cooperating to address their many mutual concerns. At a time when so many of our important international institutions seem at a standstill, at a time when so many of them seem to be in a stalemate, at a time when continued support for so much of what the nations of the world have tried to accomplish together through multilateral efforts and through multilateral institutions seems so very doubtful, the WTO simply must remain a source of stability for the world.

The World Trade Organization is an example of all that can be achieved through “multilateralism” to approach Lecky’s circle. The WTO is an example of the mutual international trust that can be achieved through consent, through consensus, and, above all, through cooperation. Whatever may happen outside the WTO, the Members of the WTO must continue to cooperate *within* the WTO. They must do so for the sake of all they hope to accomplish together both *within* the WTO and also *outside* the WTO.

This is especially so for the two leading traders in the world — the United States of America and the European Union. Because they are the two leading traders in the world, America and Europe share a special responsibility to cooperate in moving the world forward on trade. If America and Europe can work together for trade, then perhaps they will also be able to work together against terror and for much else that is needed by the world. America and Europe can do much more *together* to help enlarge the circle of human sympathy than either can do *on its own*.

The Secretary-General of the International Chamber of Commerce, Maria Livanos Cattai, advises us, in the International Herald Tribune, that, “There can be no fortress America, no fortress Europe, in a world in which the fortunes of nations are more tightly intermeshed than ever before. ... The WTO is a shining example of multilateralism at work. Member governments accept its authority as the maker and enforcer of the rules of international trade. The WTO has always managed to overcome conflicts among its members and its authority remains intact. Helping to steer the Doha round to success would be the most dramatic proof the European Union and the United States could offer that the spirit of multilateral cooperation is still alive and well.”²²

With this, too, I agree. In particular, as an American, I think it appropriate that America fulfill its responsibility as the world’s leading trading nation by leading in the effort to forge more multilateral cooperation. The United States of America accounts for about twenty percent of all the world’s trade. Since 1995, the United States has accounted for about two-thirds of all the world’s economic growth.²³ America, the world’s leading trading nation, remains, as The Economist of London aptly puts it, “the engine of the world economy.”²⁴

The United States has unprecedented economic might, and might of all kinds must always be used for right. One responsibility of the United States of America as the world’s leading economic power during this difficult time in the history of the world is the responsibility of continuing to support the world trading system that is served by the WTO. The pressures of protectionism and the politics of parochialism must not prevent Americans from seeing our true and enduring interest in the continued success of the WTO, and in the continued strengthening of the WTO-based multilateral trading system.

In particular, the WTO is an example to the world that a multilateral system for the peaceful settlement of international disputes can work. The world is much in need nowadays of such examples. Trade is not terrorism. Widgets are not warfare. Even so, we Americans are much in need nowadays of opportunities for reassuring the rest of the world that we seek the success of multilateral systems for international cooperation and for international dispute settlement. The WTO is one such opportunity we must seize in our continued efforts to provide that reassurance.

The American philosopher John Rawls, in the tradition of Mill, and in the spirit of Lecky, suggested “reasonableness” as a way of bringing people from different backgrounds and cultures together to address common concerns.²⁵ He saw value in simply trying to work together. He saw potential in talking and listening and reasoning together. To be sure, not everyone will be persuaded by reason, and, thus, not every international dispute can be resolved by resort only to reason. Others are not always reasonable. Trust is not always attainable. But trust is always desirable. Trust is better than troops. Reason must always be our *first* resort. The abandonment of reason through the use of force must always be our *last*.

In urging “reasonableness,” Rawls had great faith in particular in what he called “public reason.”²⁶ By this, he meant active participation by active citizens in a free and ongoing public debate. He meant a public deliberation leading to an act of decision-making in which all who participated would feel that they had an active part. From such a deliberative process would come, he believed, what we would call in the WTO a “consensus.”

A “consensus” in the WTO is not unanimity. Article IX, paragraph 1, of the Marrakesh Agreement establishing the World Trade Organization provides that, with respect to decision-making, “The WTO shall continue the practice of decision-making by consensus followed under GATT 1947.”²⁷ Footnote 1 to this provision of the WTO treaty explains, “The body concerned shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting when the decision is taken, formally objects to the proposed decision.”²⁸

Thus, a “consensus” in the WTO is an agreement to go along and to go forward and to go together as one — even in the absence of absolute unanimity. It is a decision that none question because it is a decision that none, in the end, feel compelled to oppose actively. It is a decision in which all are willing to join, because it is one in which all have played a part in making. A decision resulting from a WTO consensus is a decision resulting from an active exercise in the WTO equivalent of “public reason.” By no means is a consensus ever easily achieved within the WTO on a contentious or controversial issue. But a consensus that is finally achieved within the WTO on such an issue is a consensus well worth the effort and well worth the having. In my view, the world desperately needs more such active international exercises in “public reason.”

One nation may, at a certain moment in history, have the power to work its will on many other nations. In our fractious and fragmented world of nations, one nation may, at a certain moment, have the power to do as it wishes without listening to other nations, and without reasoning with them in a sincere effort to reach anything even resembling a consensus. But my reading of history reminds me that such moments in history can be fleeting, even for the most powerful of nations.

Far better to reason together. Far better for every nation, no matter how powerful it may happen to be at some passing historical moment, to have the patience to engage in “public reason” by reasoning with others and, especially, by listening to others. For the seven of us at the round table of the Appellate Body, for the 146 Members of the WTO, for all the nations of the world in all that they must try to do together, this is the only way to reach a real consensus, and this is the only way to make continued and lasting progress in expanding the circle of humanity.

In these first years of the twenty-first century, we are understandably less sanguine and more skeptical than W.E.H. Lecky about the possibilities of progress for humanity. A decade after he died in the reassuring inner sanctum of his book-lined library, the calm certitudes of his Victorian era were shattered by the sudden violence of the First World War. All these years later, in the aftermath of two world wars, in the

wake of the Holocaust, and in the shadow of the mushroom cloud, Lecky would perhaps understand the doubts of those today who are less hopeful than he was about the prospects for human progress.

Lecky observed once that, with societies and with eras, there is a “hidden bias of the imagination” that affects the course of events.²⁹ He believed that there are certain unstated predispositions of civilizations and of times that have a far greater impact on the climate of opinion, and thus on the flow of events, than any display of logic.³⁰ He believed, too, that this same observation applies equally to individuals. I think he was right. And I am persuaded that, as Lecky no doubt would have acknowledged, this observation applies equally to Lecky himself.

Lecky was imbued with the belief in progress that was characteristic of the Victorian era. He believed in progress because — although he was a rationalist who wrote about the virtues of rationalism — he retained nevertheless the prevailing Victorian belief in God’s will. He had faith that Providence was guiding the evolution of humanity toward an ever-larger circle. He was confident that tomorrow would be better than today, because he thought that tomorrow would take us ever closer to the true morality of a true humanity.

Lecky described himself as “half vagabond, half bookworm.”³¹ He lived *with* books, and, to a great extent, he lived *in* books. He traveled primarily to go to libraries, and, when at home in London, he spent much of his time in his library. When he finally entered Parliament late in life, he complained that politics was an interruption of his lifelong devotion to books and literature. Lecky was the kind of man who corrected the page proofs of his latest book while on his honeymoon. (Lecky’s obliging wife — a “lady-in-waiting” to Queen Sophia of the Netherlands — evidently tolerated that; Rebecca, who is not fond of waiting, would not.)

In all his Victorian bookishness, Lecky could not imagine a world in which humanity would not progress. As Donal McCartney has put it, Lecky’s books, including the history of European morals in which he gave voice to his view of the ever-enlarging circle of humanity, were “written by one who held a firm belief in the idea of progress. The general theme of the books might be said to have been the story of the gradual triumph of rationalism, liberty and tolerance in European history. There could be no going back on these advances. It had never once crossed Lecky’s mind that there could be any retrogression to persecution and intolerance in Western civilization.”³²

Lecky wrote confidently, “Liberty, industry and peace are in modern societies indissolubly connected, and their ultimate ascendancy depends upon a movement which may be retarded, but cannot be arrested.”³³ We know better. For all our occasional inclinations toward triumphalism, for all our considerable confidence in the manifest potential of both democracy and capitalism, for all our wishful thinking about the “ultimate ascendancy” of all our many hopes for humanity, we definitely know better. The years since Lecky left us have taught us only too well that progress toward a wider circle of humanity is by no means assured. It definitely can be arrested.

Yet this is all the more reason for us to try to expand the size of our circle. This is all the more reason for us to broaden our “range of duty” in order to broaden the sweep of human concern and, thereby, the scope of human morality. This is all the more reason for us to use human morality to help us achieve human progress. Here in the twenty-first century, I, for one, do not have the absolute certainty that Lecky had in the nineteenth century about the “ultimate ascendancy” of humanity through continued human progress. The American mind of my time is not the Victorian mind of his time. I have other hidden biases of the imagination. Even so, I choose to imagine the possibility of human progress. More important, I have chosen to spend my life working to make what I can imagine *for* the world a living reality *in* the world. That is what brought me — and what brought others who share my stubbornly optimistic view — to the round table of the Appellate Body of the WTO.

The cosmologists, like the poet, say that, eons from now, the world will end with a whimper, and not with a bang.³⁴ I do not presume to know if they are right. It is not for me to foresee the completion of the human effort in this world. Like Lecky, I trust Providence to tend to our ultimate fate. For my part, I am far more interested in what will happen between now and then to those who live in the world that Providence has entrusted to us. And I am far more interested in fulfilling my own range of duty in the ongoing human effort.

Progress can sometimes be hard to see. While researching once in a library in Paris, Lecky found the minute scrawl of the fabled French diplomat Talleyrand so microscopic that he had to use a magnifying glass to read it. Similarly, sometimes it may seem that we need a magnifying glass to see the crawl of human progress toward Lecky’s enlarged circle. The failures of international dispute settlement are featured in dying color on the bleeding broadcasts of CNN. The successes of international dispute settlement are written in boring black and white in the tedious pages of WTO reports.

Hard as it may sometimes be to discern, human progress is nevertheless possible. We need not be Victorian “men of letters” to believe that tomorrow can be better than today. But, to make progress, we must first be able to see the possibility of progress, and, to see it, we must first be able to imagine it. We must change the hidden biases of our imagination.

In trade, we have imagined progress. This helps explain why there is a WTO. In other areas, we have not yet done so. This helps explain much else. This helps explain, for example, why so many of the nations of the world are only now beginning to see the need for strengthening the authority and the capability of the World Health Organization in dealing with SARS, AIDS, and other global epidemic diseases that do not respect artificial political borders. This helps explain also why we have failed thus far to make concerted multilateral efforts to protect and preserve the world’s environment comparable to those that we have made to expand the world’s trade. There are, of course, numerous other equally compelling examples that I might use to illustrate all the other ways in which our imagination falls short of our genuine global need. Alas, there are far too

many examples of where we are not yet meeting an urgent global need *because we do not yet see it*.

The right answer for the world is the approach we have taken to finding the right answers at the round table of the Appellate Body of the WTO. Conversation. Deliberation. Mutual criticism. And, as a result, mutual trust. The right approach, in other words, is what Mill and Lecky and Rawls would all call “reasonableness.” The only way to human progress is through human freedom, and the only way to human freedom is through the reasonableness that is the key to freedom.

Admittedly, this may be easier for the seven of us on the Appellate Body than for all the assembled nations of the world in all the various multilateral venues in which they meet and deliberate and pontificate. For all our differences, the seven of us on the Appellate Body are in many ways all alike. To borrow trade terminology, the “process and production methods” around the world that eventually brought the seven of us together at our table in Geneva may have differed considerably; yet the seven of us are very much “like products.” Accordingly, the picture we each have of the world is very much alike. If it were not, we would not have been asked by the Members of the WTO to sit together and work together around our table.

And yet, as I picture the world, this is true as well of different individuals and of different peoples throughout the world. We are all very much “like products.” No matter our nationality, no matter our ethnicity, no matter our race, no matter our religion, no matter our sex or our age or our circumstance, no matter the vast cultural and other differences that may often divide us, we humans are, nevertheless, all “like.” We are all alike in that we all share a common kinship that transcends our many differences. We are all part of the one circle of humanity.

In believing that there is one circle of humanity, in believing that the true circle of humanity is a single circle that includes *all* of humanity, in believing that, therefore, our circle of humanity must be enlarged through continued human progress to include all of humanity, Lecky did not underestimate the persistence of culture as a challenge that must be faced in the making of such progress. On the long, solitary mountain walks he often took when he was not reading and writing in his library, Lecky carried along in his pocket a copy of Edmund Burke’s Reflections on the Revolution in France.³⁵ Like Burke, he was very much aware of the importance of the “little platoons” of local cultures, and of the challenges that the habits, the traditions, the attitudes, and the very diversities of local cultures present to the continued enlargement of the human circle.³⁶

Lecky shared Burke’s view that, “To be attached to the subdivision, to love the little platoon we belong to in society, is the first principle (the germ as it were) of public affections.”³⁷ It was perhaps for this reason that Lecky spent so many years writing a history of Ireland that was notable in particular for its defense of Irish culture. At the same time, Lecky, like Burke, was of the view as well that, as Burke went on to say in the very next sentence of his famous reflections, the “little platoon” of our local affections is “*the first link* in the series by which we proceed towards a love to our country *and to*

mankind.”³⁸ There must be other links beyond this first link that will lead us to a broader range of duty and to a similar allegiance to the larger circle of all of humanity.

This is seen clearly in Lecky’s attitude toward the political relationship between Ireland and Britain. Like Burke before him, Lecky was an Irish “Unionist.” He favored the continued union of Ireland and Britain, and he did so at a time when many Irish patriots who shared many of Lecky’s other views were moving ever closer toward separation, and toward Irish independence. He was, however, no less of an Irishman because of it. After all, it was the Irish, not the British, who raised a statue of him in Dublin.

Lecky hoped that Ireland and Britain would be able to reason together in ways that would sustain their union. He believed, as I do, that a crucial part of our likeness is the capability we share as humans of reasoning together. This is true for seven people. This is true for hundreds, thousands, millions, or billions of people. This is true in trade. This is true also in much else of mutual international concern. Above all, and despite all, we must somehow reason together.

Reasonableness must be our approach in all our continuing multilateral efforts to further trade. Multilateral trade negotiation is one of the best opportunities we have for employing reasonableness by reasoning together, and multilateral trade liberalization through such negotiation is one of the best ways we have to help enlarge the circle to include all of humanity. Through the combined power of cooperative reason in the WTO, the nations of the world can continue to help free humanity through trade. Trade is an essential means to the essential end of liberating humanity so that we can all live together in freedom.

The connection between trade and freedom is one that is both critical and often overlooked. Our dignity as individual human beings depends on our ability to choose our own destiny. Thus, freedom is about choosing. Freedom is about having real choices about how to live. The liberty that is freedom is about choosing for ourselves. The French thinker Simone Weil once suggested that, “Liberty, taking the word in its concrete sense, consists in the ability to choose.”³⁹ Likewise, I would suggest that humanity, taken in its truest and highest sense, consists in believing that other people have the capacity to choose for themselves — if they are given the choice. Accordingly, by multiplying choices, by increasing the ability to choose, trade serves the end of freedom, and thereby serves as well the goal of establishing the single circle of all of humanity.

Reasonableness must likewise be our approach in all our other multilateral efforts beyond trade. In addition to the means of trade, other multilateral means are also needed to serve the end of freedom. Other means are also needed to help enlarge the circle of human sympathy to include all of humanity. Expanding trade is only one way to expand Lecky’s circle. There are others. There are numerous other global concerns that demand global solutions if we are to have any hope of changing all the numbing statistics of world deprivation, and of having the full measure of both freedom and humanity throughout the world.

Some of these concerns affect trade or otherwise relate to trade. Others do not. The numbing statistics reveal many global needs. The world is a circle of many truly global concerns. These include — but, as we lawyers say, are not limited to — human rights, women’s rights, the environment, health, intellectual property, investment, crime, corruption, and, of course, terrorism, genocide, and all the other dire dilemmas that so urgently demand cooperative acts of collective international security.

Our need for international law to address these and other international concerns is great, and is greatly increasing. But our *awareness* of our need for international law, and of our need to establish and to abide by the international rule of law, is not increasing. The geographical distance between us seems to be diminishing, but the other distances between us are not. Even as the forces of “globalization” seem to be making our world smaller, other forces are pulling us farther and farther apart.

When lecturing at Harvard Law School some time back, I spoke at length about what I consider to be the significant and positive contribution the WTO is making in demonstrating to a skeptical world that there can be such a thing as the international rule of law. Afterwards, one of the bright students at Harvard asked me a question that I confessed at the time I could not answer.

The question was this.

In trade, independent nation-states have a clear and compelling economic incentive to cooperate in finding global, multilateral solutions. In the WTO, mutual cooperation leads to greater mutual prosperity. In WTO dispute settlement, a refusal to comply with rules and rulings can lead to costly economic sanctions. But where is the incentive for compliance with international law in other areas of global concern — in areas where there is *not* an obvious economic incentive, and where there is *not* the *economic leverage* that there is to help secure and ensure compliance in the WTO? It is difficult enough to achieve consensus and compliance in the WTO — where there *is* such leverage. How can we do it *elsewhere*?

This is a very good question, to say the least. There are about thirty thousand pages of rules in the WTO treaty. There are about thirteen thousand pages of rulings in WTO dispute settlement. The Members of the WTO comply with these rules and with these rulings because they see it as in their self-interest to do so. They want the trade concessions that are secured by compliance. They do not want the trade sanctions that can be the price of non-compliance. But what about the other treaties besides the WTO treaty that have been concluded by the nations of the world? And what about all the additional treaties that the world still needs to negotiate and conclude? What about, say, the international agreement to combat terrorism that the world has long discussed, but has not even come close to concluding? Where is the incentive to comply with other international laws that are not part of the WTO treaty, and where is the leverage to enforce them?

I promised that bright young Harvard law student that I would think about the answer to this question. I have thought long and hard about it ever since. I have concluded that my answer is the same as the answer that was given long ago by William Edward Hartpole Lecky.

Lecky said, “He who seeks to improve the moral condition of mankind has two, and only two, ways of accomplishing his end. The *first* is, to make it more and more the interest of each to conform to that of the others; the *second* is, to dispel the ignorance which prevents men from seeing their *true interest*.”⁴⁰ Therefore, as Lecky saw it, there are only two ways to further human progress. One is to find new ways to help us cooperate with one another in our mutual self-interest — such as through the WTO. The other is to find new ways to help us educate and otherwise enlighten one another so that we will be able to *see our true self-interest*.

The Oxford and Cambridge Club in London has a large library filled with shelves and shelves of old books. On one of the lofty shelves there, I found the two volumes of another old book by Lecky, entitled History of the Rise and Influence of the Spirit of Rationalism in Europe, which was published in 1865.⁴¹ Fortunately, unlike “The Bookworm” in Geneva, the library of the Oxford and Cambridge Club has a tall ladder. So I climbed the ladder, pulled down the dusty volumes, and spent the better part of a pleasant afternoon sitting alone in the silence of the library and reading more of what Lecky had to say about the importance of seeing and serving our true self-interest. (Although I was all alone in the library, in keeping with the rules of the club, I wore a coat and a well-knotted tie while I did so.)

Lecky acknowledged that there is a “bond of intellectual sympathy” among some of us that inclines some of us to *desire* to cooperate in our mutual self-interest.⁴² Intellectually, rationally, logically, there are some among us who want to work together in our mutual interest. The difficulty is in doing so. Lecky’s solution to this difficulty was to urge *more* of us to learn *how* to do so by *trying* to do so. He maintained that “human nature is so constituted that it is impossible for bodies of men to work together under the sense of a common interest without a warm feeling of amity arising between them. Common aims and hopes knit them together by a bond of sympathy. Each man becomes accustomed to act with a view to the welfare of others, and a union of affections usually replaces or consecrates the union of interests.”⁴³

One example illustrating the essential truth of Lecky’s insight is my own experience on the Appellate Body. In my eight years on the Appellate Body, I have seen firsthand how “common aims and hopes” can knit individuals together in a “bond of sympathy.” I have seen firsthand how a “union of affections” can create and facilitate a “union of interests.” In our work together for the Members of the WTO, we seven see ourselves, not as seven, but as one. We have seen the Appellate Body as one from the very beginning.

My hope is that, long after I have left the Appellate Body, those who serve on the Appellate Body will continue to see themselves as one in their continued mutual efforts

to serve the Members of the WTO. Much can continue to be achieved by the Members of the Appellate Body by continuing to work together as one toward the common goal of strengthening and sustaining the WTO dispute settlement system as an international institution that will serve all of the Members of the WTO equally and effectively. Much can be achieved by a mutual commitment to the kind of real conversation that has always made the Appellate Body think and act and serve as *one*.

Still another example of the validity of Lecky's insight is the broader experience, first, of the Contracting Parties of the GATT, and now, of the Members of the WTO. Cooperation is based on trust. Trust builds on trust. Trust is generated by interaction. Trust is based on habit, and not merely on rational calculation. The trust that emerges from the habit of working together is an example of what some economists call "social capital."⁴⁴ The "social capital" within the WTO is evidenced in the humdrum, day-to-day working of the WTO-based world trading system that rarely is referenced in the pages of the world's press or in the rhetoric of the world's protests. The disputes that are addressed by the Appellate Body are the rare exceptions in a global trading system in which a mutual trust among the Members of the WTO largely prevails, and in which their mutual trust contributes significantly to a considerable mutual compliance with the agreed rules for trade.

By working together, the Members of the WTO have established the *habit* of working together. By establishing the *habit* of compliance with WTO rules, they have encouraged *more* compliance with WTO rules. Modern mathematical game theorists call this "Tit for Tat." Lecky would simply have called this human nature. For the 146 Members of the WTO, just as for the seven Members of the Appellate Body, the shared and sustained experience of working together has created, and sustains, a "bond of sympathy" and a "union of interests." It does so now for all the current 146 Members of the WTO. Ultimately, it can do so for all the world.

All the same, Lecky stressed that none of us, whether individuals or nations, will want to engage in the real conversation that can lead to real mutual trust unless we believe that it is *in our interest* to do so. Altruism is admirable. Altruism is not a fit or a firm foundation for effective international law. There must be the perception of a real interest to inspire the real conversation and the real trust that, alone, can be the basis for real international law. As Lecky explained, "The bond of intellectual sympathy alone is far too weak to restrain the action of colliding passions, and it was reserved for political economy to supply a stronger and permanent principle of unity. This principle is an enlightened self-interest."⁴⁵

By "political economy," Lecky, a nineteenth-century man, meant a policy aimed at attaining and maintaining the nineteenth-century goal of freer trade. In his mid-Victorian musings, he was echoing the views of Adam Smith, David Ricardo, Richard Cobden, and their many free-trade followers of his time. But this is also our goal in our time. Lecky was also anticipating some of the assumptions that are between the lines of the WTO treaty, and that are taking the Members of the WTO into the twenty-first century.

One of those assumptions is that of a fixed and, unchanging human nature that focuses on self-interest, and thus on the need to perceive, and to appeal to, an enlightened self-interest. “Taking human nature with all its defects,” observed Lecky, “the influence of an enlightened self-interest first of all upon the actions and afterwards upon the character of mankind, is shown to be sufficient to construct the whole edifice of civilisation; and if that principle were withdrawn, all would crumble in the dust.”⁴⁶

His emphasis on the need for an enlightened self-interest was not in any way an original thought with Lecky. Nor was it in any way an original thought with Smith, Ricardo, Cobden, or others of his time who influenced his Victorian thinking. There were many others who preceded them in perceiving the importance and, indeed, the indispensability, of an enlightened view of self-interest to expanding the circle of human morality and, thus, human sympathy. There have been many others who have concluded, as Lecky did, that, without an enlightened view of self-interest, civilization will “crumble in the dust.”

An enlightened view of self-interest can, for example, be seen as a key to Aristotle’s Politics. Like all classical Greeks, Aristotle could not even conceive of a happy or a virtuous life outside of the context of the mutually cooperative framework of the Greek *polis* — the Greek city-state.⁴⁷ Likewise, and contrary to the common misconception of many today, Adam Smith’s “moral sentiments” were much more about cooperation than about competition. He saw trade primarily as a way of cooperating, not of competing. That is why he placed so much emphasis on the necessity of a division of labor in his most famous book, The Wealth of Nations.⁴⁸ Moreover, the first paragraph of the first page of the other, and often neglected, first book by that great champion of the pursuit of self-interest, A Theory of Moral Sentiments, is a ringing assertion of the centrality of the bonds of human sympathy.⁴⁹ Similarly, at the very center of the thoughts of Alexis de Tocqueville on the possibilities for human progress through the development of democratic self-government is his belief that, in perceiving and pursuing our self-interest, we must look both far ahead and far afield; we must adhere to what he described as “the principle of interest rightly understood.”⁵⁰

And so on. In Christian ethics, in Muslim ethics, in Jewish ethics, in Hindu ethics, in Buddhist ethics, in both religious and secular thinking of all kinds in all parts of the world and all through the centuries, there has been a pervasive emphasis on perceiving and pursuing an enlightened self-interest. In advocating adherence to an enlightened view of self-interest, Lecky was merely following in many other similar footsteps. Indeed, if there is one common thread that runs through much of theology and philosophy from antiquity to today — and that, I would contend, has universal application for all of humanity today and tomorrow — it is the common thread of the indispensability of an enlightened self-interest to the furthering of human progress and to the progressive unfolding of an ever-expanding human morality and human sympathy.

Thus, the answer to the question I was asked by the student at Harvard about the future of international law is found, not in the nuances of law itself, not in the particulars

of law *per se*, but in how we see our *true self-interest*. And how we see our true self-interest depends on how large we see the *size* of our circle. Do we really see *other* people as part of our circle? Do we really see other people *in other parts of the world* as part of our circle? Do we really see *their* welfare and *their* well-being as part of *our* self-interest? Do we wish for others what we wish for ourselves? Are other people, wherever they may be, our neighbors? Are they our sisters and our brothers? Or are they *only our prey*?

As Lecky suggested, the range of duty we see ourselves as having to others is likewise the range of what we see as our self-interest. It is also, as a consequence, the range of what we see as our need for law. The long historical progression from preying on others to trusting in others is a progression away from might, and toward right. It is a progressive expansion of our range of duty, and a progressive enlargement of our circle of human sympathy. It is the progression away from barbarism, and toward law. It is the progression away from the rule of power, and toward the rule of law.

We still have a long road to travel from power to law. In particular, we still have a long way to go, we still have a long way to progress, to reach and realize the *international* rule of law. We have reached the point where nations feel compelled to *claim* they are adhering to the international rule of law. We have not yet reached the point where nations necessarily always do so. *Rhetorically*, our range of duty sometimes seems to include the whole world. But *realistically*, it does not. And thus, *legally*, it does not, because all too often what are described as “laws” that are meant to fulfill the full extent of our duty to others elsewhere in the world do not, *realistically*, have any real meaning.

Why not? Why does power still so often prevail over law? Why does the reality of the international rule of law fall considerably short of our rhetorical commitment to the international rule of law? The answer is in what we are able to *see*. Like everything else of man’s devising, the law can be considered an *invention*. The British philosopher Mary Midgley has observed that the notion of an invention is not an abstract notion; it has meaning only “with reference to a given purpose. You can invent the spinning jenny, or a more humane form of divorce, or the notion of representative government, once you know that you want them.”⁵¹

This is equally so with the invention of law. Just as other inventions occur only “once you know that you want them,” so too does law occur only once you know that you want law. For this reason, international law, like any other law, will occur only once we know that we want it. But we will not *want* law until we know that we *need* it. And we will not *need* it until we *see* that we need it. And we will not *see* that we need it while the *size* of our circle of human sympathy remains smaller than the scope of the international law that we need.

An example of a society that did *not* see the need for invention was ancient Greece. The classical Greeks lived in a world in which everything seemed to be new. They had no precedents. They had no models. In the words of a great British historian of

ancient Greece, the late Moses Finley, theirs was a situation of “compulsory originality.”⁵² The Greeks responded to the challenge of this situation with an originality that perhaps remains unequalled. In virtually every emerging form of human inquiry — including the scientific and mathematic pursuits of astronomy, biology, physics, geometry, meteorology, and more — the classical Greeks were pioneers of surpassing originality.

Long before Einstein, Democritus advanced an atomic theory of the universe. Long before Darwin, Anaximander anticipated the theory of evolution. Long before Copernicus and Galileo, Aristarchus argued that the earth circles the sun. In these and numerous other ways, the ancient Greeks demonstrated the reach of their originality. And yet, as Finley noted, “[T]he list of Greek inventions is a very short one indeed.”⁵³

There were several reasons for this. Because the Greeks had slaves, they had less need for inventions. Because the Greeks had an aristocratic tradition that valued leisure, they had less interest in what we would consider as useful work. Generally, they were content to engage in the originality of their remarkable deductive reasoning; they gave little thought to how the conclusions from their reasoning might be used to improve materially the quality of their daily lives.

The Greeks wanted to *know*, but for the most part they did not see the need to use their knowledge for invention. Theirs was what economists call a “bounded rationality.”⁵⁴ For all their considerable capabilities for reasoning, they could not see beyond the bounds of the structure of their own ancient world. In Finley’s judgment, “Apparently the society as a whole lacked the mentality and the motivation to strive systematically for greater efficiency and greater productivity.... What was missing was an intangible factor, a Baconian spirit which regularly and persistently turns speculation into empirical research, empirical research into practical application.”⁵⁵

Thus, as Lecky would remind us, the Greeks, too, had their “hidden bias of imagination.” They did not share his view — or our view — of human progress as involving economic growth through the practical application of innovative ideas in technological inventions. They did not *know* that they wanted inventions. They did not know that they *needed* them, because they did not *see* a need for them. They could not imagine them.

We face the same challenge today. Today with respect to international law, our own capabilities for reasoning — and especially for reasoning together — are bounded by the limits of our imagination. We cannot have the international rule of law if we cannot imagine a world in which there *is* the international rule of law. We cannot know that we need it if we do not see the need for it. And we cannot see the need for it if we cannot see as far as all of humanity. We cannot see the need for the international rule of law if we cannot see clearly enough to change the hidden bias of our imagination.

Generally, with trade, we see our shared interest in working together. Trade serves and strengthens our shared interest. By its very nature as an act of exchange, trade

is an *acknowledgment* of a shared interest. In the multilateral trading system that is served by the WTO, this shared interest is reflected most clearly in the “most-favoured-nation” principle that is at the very heart of the system. A principle that provides that one trade concession made by one WTO Member to one other WTO Member must also be made to all other WTO Members is a principle that, above all else, acknowledges the shared interest of all WTO Members in securing the mutual benefits of trade.

Yet, even in trade, often we do not see the interest we share. Thus, even in trade, we do not always serve our shared interest as we should. In particular, even in trade, we do not always see clearly enough our shared interest in establishing and upholding the international rule of law. More so, in areas of international concern other than trade, often we are even less likely than we are in trade to see our shared interest in the international rule of law. Because we cannot see it, we cannot serve it. We cannot advance the international rule of law in those other areas of shared human concern because we cannot see beyond the current limits of our imagination.

The circle of the ancient Greeks was enclosed by the limits of their own thinking. They could not see beyond it. All those who were not Greeks were barbarians. They spoke the “bar-bar” of something other than Greek, and so they were the outsiders. They were the “others.” They were the foreigners who were beyond the limits of the Greek circle. At the dawn of rational thought, the ultimate implications of the profoundly original Greek thinking were universal. Yet the limited size of the Greek circle kept the Greeks from seeing the true extent of those implications.

So too with the way that many who profess to believe in law see the supposed limits of law today. The way they see the potential of law is limited by the way they see the limits of their self-interest. Thomas Hobbes, a Londoner who was a dedicated student of both the Greeks and self-interest, told us long ago, “Covenants, without the sword, are but Words”⁵⁶ Short of the sword, the only other way to enforce the covenants we choose to call “international law” is by seeing more than we see now. It is by expanding the circle of our sight. It is by inspiring an ever-expanding circle of enlightened self-interest. The larger the circle, the larger the need we will see for international law that is really “law,” and not merely “words.”

Where international law is concerned, we live, like the ancient Greeks, in a time of “compulsory originality.” And, to be sure, we have no lack of originality among our legal thinkers. We have no lack of legal theories that can have practical application in a world much in need of international law, and in need even more of the international rule of law. What we lack is a sufficient awareness in the world that real and inventive and practical applications of international law are needed.

Those of us who believe we need “law” — and who believe especially, and increasingly, that we need “international law” — must understand above all what it is that *precedes* “law.” Law is preceded by a perception of a duty. Thus, an awareness of a duty precedes a willingness to abide by a law. Law will exist only to the extent that we

see a need for law in fulfilling our “range of duty.” Law will exist only to the extent that we see the need to be *bound* by law.

In his book, Ways of Seeing, the British art critic John Berger told us, “Seeing comes before words. The child looks and recognizes before it can speak. But there is also another sense in which seeing comes before words. It is seeing which establishes our place in the surrounding world....”⁵⁷ As with art, so with law. Seeing comes before words, and, thus, seeing comes before the words that comprise the laws that place us all in the surrounding world. For this reason, the foremost frontier in international law is the frontier of what we *see*. It is the frontier of what we see as our true self-interest. It is the frontier that faces all of us who seek a surrounding world in which there *truly is* international law.

Can we look beyond the grim reiteration of all the numbing statistics of human degradation to see at last the sheer human reality they represent? Can we look beyond the mere numerical fact that there are 826 million people in the developing countries of the world who suffer from malnourishment to see the hunger of a single human being somewhere in Asia?⁵⁸ Can we look beyond the mere numerical fact that there are 968 million people in the developing countries of the world with no access to safe drinking water from improved water resources to see the thirst of a single human being somewhere in Africa?⁵⁹ Can we feel the sheer urgency of their hunger, their thirst, their poverty, their deprivation, their desperation, *if we do not see it?* And can we see it if we do not see and, thus, do not acknowledge the basic humanity that each and every one of them shares with us? Can we really treat them as anything other than mere numbers, as anything other than mere statistics, *if we do not see each and every one of them as part of our circle?*

Article 102 of the Charter of the United Nations provides that every treaty and every other international agreement that is entered into by a Member State of the United Nations shall be registered and published by the United Nations Secretariat.⁶⁰ The United Nations Treaty Collection contains more than forty thousand treaties.⁶¹ Many of these treaties are followed and upheld. But many are not. Many are simply ignored in the day-to-day dealings and doings of the nations of the world.

For all of the “international law” we have made as a world, ours remains a world that is largely *without* international law. We know a lot about how to negotiate and conclude and sign and ratify and even register treaties. We know a lot less about how to give them real meaning as real law in the daily life of the world. We know a lot about how to *make* international law. We know a lot less about how to make international law work for all of us in the large circle that includes all of those who are much in need of international law all over the wide world.

Why is international law so often evoked but so often not obeyed? Why do sovereign nation-states so often simply ignore international law and international tribunals? They do so because they can, and they do so because they do not *see* why they should not. Like the ancient Greeks, their circle is too small. It is enclosed by the limits

of their own thinking. To expand their thinking, to expand the domain of international law, the nations of the world must expand the size of their circle. In a world where there truly is international law, the circle of human sympathy will truly be a circle that includes the whole world.

Lecky was much taller than I am. He could reach the top shelf. He was so “very tall” that, on the long walks they often took together, he had to stoop over to hear the soft voice of the aged Thomas Carlyle.⁶² Lecky was tall enough to foresee the future. Like many men, he grew more pessimistic as he grew older. The glass that seemed half full in his youth seemed in his later years to be half empty. Like some others of his time — and like some also of our time⁶³ — Lecky worried about extending the limits of liberal democracy out of fear that doing so would lead to illiberal results. He feared that too much democracy would result in too little freedom. Yet, even in his old age, Lecky retained the optimistic belief in human progress about which he wrote so eloquently in his youth.

Later in life, Lecky wrote a multi-volume history of eighteenth-century England, and also a multi-volume history of eighteenth-century Ireland. These lengthy narrative histories were widely read and widely praised at the time. Even today, they are, on occasion, still read. But it was his youthful book on the history of European morals that was, of all his books, Lecky’s favorite. Perhaps this was because it was in that early book that Lecky voiced the most optimism about the future. It was in that youthful distillation of all the hopes he held as he delved so deeply into all the dusty shelves of all the musty libraries of Europe that he saw most clearly the expanding circle of humanity.

It was also in his youth when Lecky first began to admire and model himself after another nineteenth-century “man of letters” who wrote about circles, Ralph Waldo Emerson. Like me, Emerson was an American who never tired of London. You can see this in every line of his collection of essays about his visit to London and to England, “English Traits.”⁶⁴ Lecky was about thirty years younger than Emerson. To my knowledge, they never met. But, in his youth, Lecky, like me, read Emerson, and the Victorian historian from Ireland was, like me, clearly much influenced by the American sage from Concord.

Lecky’s histories were really extended philosophical essays in a style reminiscent of Emerson’s own timeless essays. Like the writings of Emerson, Lecky’s writings were really lay sermons that sought to inspire a thoughtful emulation. In his writing, and in his thinking, Lecky admittedly emulated Emerson. Like Emerson, “he tried to crystallize political wisdom in a single shining sentence.”⁶⁵ And, like Emerson, he saw the world as a world of circles in which the range of what we see shapes the range of what we do.

At some point in his youth, before writing his history of European morals, Lecky must surely have read Emerson’s essay entitled “Circles.” If so, it must have influenced his own thinking, even as it has influenced mine. In that essay, Emerson wrote, “The life of man is a *self-evolving circle* which, from a ring imperceptibly small, *rushes* on all sides *outwards* to new and larger circles, and that without end.... The eye is the first

circle; the horizon which it forms is the second; and throughout nature this primary figure is repeated without end.... Our life is an *apprenticeship to the truth*, that *around every circle another can be drawn*. ... The one thing which we seek with insatiable desire is...to *draw a new circle*....”⁶⁶

As Emerson taught us, our “invisible thought” makes our visible world.⁶⁷ As Lecky taught us, the “hidden bias” of our imagination determines what is visible to us in the world around us. For Emerson, for Lecky, and for me, the question is one of what we can *see*. The size of our circle depends on our eyes. It depends on our sight. It depends on who and what and how far we can see across the horizon.

Can we see anything beyond our own narrow-minded and short-sighted selfishness? Can we see as far as next door? Can we see as far as the farthest forgotten and forsaken corner of our imperiled planet? Will we turn inward? Will we turn our eyes away from the world? Or will we turn outward toward the world, and to new and larger circles, without end?

From my seat in our small circle called the WTO Appellate Body, from my front row seat on the frontier of international law, I see an urgent need for a new and larger circle. I see our apprenticeship to truth as ending only when we finally discover the truth about our real interest as individuals and as nations. I see our apprenticeship as ending only when we clearly and finally *see* that our true self-interest includes *all of humanity*.

Together, we must draw a new circle that embraces all the world.

Together, we must draw Lecky’s circle.

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Notes

- ¹ James Boswell, Life of Johnson (Oxford: Oxford University Press, 1980), 859 [1791].
- ² W.E.H. Lecky, History of European Morals from Augustus to Charlemagne (New York: George Braziller, 1955) Volumes I and II [1869], hereinafter Morals.
- ³ Many of the personal and anecdotal details about Lecky in this essay are drawn from the excellent biography by Donal McCartney, W.E.H. Lecky: Historian and Politician, 1838-1903 (Dublin, Ireland: The Lilliput Press, 1994), hereinafter Lecky. This quotation is on page 189.
- ⁴ McCartney, Lecky, at 29.
- ⁵ Lecky, Morals, Volume II, at 256.
- ⁶ Lecky, Morals, Volume I, at 100-101.
- ⁷ Lecky, Morals, Volume I, at 285.
- ⁸ John Stuart Mill, On Liberty (London: Penguin Books, 1985) [1859].
- ⁹ Id. at 115.
- ¹⁰ Id.
- ¹¹ Claus-Dieter Ehlermann, "Reflections on the Appellate Body of the WTO," Address to the American Society of International Law, Washington, D.C. (April 3, 2003).
- ¹² World Trade Organization, The Multilateral Trading System: 50 Years of Achievement (Geneva, 1998),
- ¹³ Id.
- ¹⁴ President John F. Kennedy, Presidential Address in Frankfurt, Germany (June 24, 1963).
- ¹⁵ The details of the University of Michigan study are discussed in Douglas A. Irwin, Free Trade Under Fire (Princeton: Princeton University Press, 2002), 29-35.
- ¹⁶ Mike Moore, Director-General of the WTO, WTO Doha and Beyond: A Roadmap for successfully concluding the Doha Development Round," Address to the Evian VII Plenary Meeting, Montreux, Switzerland (April 12, 2002).
- ¹⁷ Id.
- ¹⁸ President George W. Bush, Address to the World Bank in Washington, D.C. (May, 2001).
- ¹⁹ World Bank, Human Development Report 2001 (Washington, D.C.), 9.
- ²⁰ Id.
- ²¹ These are also only a few of the statistics that I might have cited. The annual reports of the World Bank on "human development" are always well worth reading in their entirety.

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- ²² Maria Livanos Cattai, “It’s multilateralism that makes the world go round,” International Herald Tribune (April 10, 2003), 8.
- ²³ The Economist (April 12, 2003), 63.
- ²⁴ *Id.*
- ²⁵ See John Rawls, Political Liberalism (New York: Columbia University Press, 1993) 212-254; and John Rawls, The Law of Peoples (Cambridge, Massachusetts: Harvard University Press, 1999) 129-180.
- ²⁶ *Id.*
- ²⁷ Article IX, paragraph 1, Marrakesh Agreement Establishing the World Trade Organization, done at Marrakesh, Morocco. (April 15, 1994), hereinafter the Marrakesh Agreement.
- ²⁸ Footnote 1 to Article IX paragraph 1, of the Marrakesh Agreement.
- ²⁹ Lecky, at 42.
- ³⁰ *Id.*
- ³¹ Lecky, at 29.
- ³² Lecky, at 66.
- ³³ *Id.*
- ³⁴ T.S. Eliot, “The Hollow Men,” in Oscar Williams, ed., Immortal Poems of the English Language (New York: Washington Square Press, 1952) 539, 542.
- ³⁵ Edmund Burke, Reflections on the Revolution in France (London: Penguin Books, 1968) [1790].
- ³⁶ *Id.* at 135.
- ³⁷ *Id.*
- ³⁸ *Id.* (emphasis added)
- ³⁹ Simone Weil, The Need for Roots (London and New York: Routledge Classics, 2002), 12 [1949].
- ⁴⁰ Lecky, Morals, Volume I, at 13.
- ⁴¹ W.E.H. Lecky, History of the Rise and Influence of the Spirit of Rationalism in Europe, in Two Volumes (New York and London: D. Appleton and Company, 1899) [1865], hereinafter Rationalism.
- ⁴² Lecky, Rationalism, Volume II, at 338.
- ⁴³ Lecky, Rationalism, Volume II, at 345.
- ⁴⁴ “A question of trust,” The Economist (February 22, 2003), 92.
- ⁴⁵ Lecky, Rationalism, Volume II, at 338.
- ⁴⁶ Lecky, Rationalism, Volume II, at 350.

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- ⁴⁷ Aristotle, The Politics (London: Penguin Books, 1981), I ii, “The State Exists by Nature,” 55-61.
- ⁴⁸ Adam Smith, An Inquiry into the Nature and Causes of the Wealth of Nations (New York: The Modern Library, 1994), 3-23 [1776].
- ⁴⁹ Adam Smith, The Theory of Moral Sentiments (Amherst, New York: Prometheus Books, 2000), 3.
- ⁵⁰ Alexis de Tocqueville, Democracy in America, translated by Henry Reeve (New York: The Colonial Press, 1899), Volume II, at 129 [1835].
- ⁵¹ Mary Midgley, Heart and Mind (London and New York: Routledge Classics, 2003), 62 [1981].
- ⁵² M.I. Finley, The Greeks (London: Penguin Books, 1963), 41.
- ⁵³ *Id.* at 127-128.
- ⁵⁴ The phrase is that of the economist Timur Kuran. *See* Joel Mokyr, The Lever of Riches: Technological Creativity and Economic Progress (Oxford: Oxford University Press, 1990), 154.
- ⁵⁵ Finley, The Greeks, at 125.
- ⁵⁶ Thomas Hobbes, Leviathan (London: Penguin Books, 1968), 223 [1660].
- ⁵⁷ John Berger, Ways of Seeing (London: Penguin Books, 1972), 7.
- ⁵⁸ World Bank, Human Development Report 2001 (Washington, D.C.), 22.
- ⁵⁹ *Id.* at 9.
- ⁶⁰ Article 102, United Nations Charter.
- ⁶¹ *See* the United Nations Treaty Collection online at un.org.
- ⁶² Fred Kaplan, Thomas Carlyle: A Biography (Ithaca, New York: Cornell University Press, 1983), 542.
- ⁶³ *See*, for example, most recently, Fareed Zakaria, The Future of Freedom: Illiberal Democracy at Home and Abroad (New York: W.W. Norton & Company, 2003).
- ⁶⁴ “English Traits,” Ralph Waldo Emerson, Essays and Lectures (New York: Library of America, 1983), 763.
- ⁶⁵ Lecky, at 186.
- ⁶⁶ Emerson, “Circles,” Essays and Lectures, *supra*, 403, at 403, 404, and 414.
- ⁶⁷ *Id.* at 404.